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Anti-corruption in Germany

Ten things to know



Ten things to know about anti-corruption in Germany

Corruption poses a significant risk to the corporate community. The consequences of corruption can be far reaching, for example, economic loss, forfeiture of profits and negative press coverage. The corporate community has become accustomed to global regulatory enforcement, most notably investigations and prosecutions under the US Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act.

More recent press coverage shows that the number of investigations by German prosecutors regarding corruption is increasing. Severe fines can be imposed on companies for the failure to prevent corruption committed by employees of the company or its agents, such as business partners. In addition, there is now a tendency to hold members of management and the supervisory board liable in the context of corruption. This is due to the step-up in regulatory enforcement and increasing pressure from stakeholders, customers and the general public.

Here are ten things to know about corruption in Germany.

01 | Jurisdiction

Generally, German criminal law applies to offences committed by individuals at least partly in Germany. This is irrespective of whether or not the bribery is committed by a German or foreign citizen. German law also applies to offences committed by German citizens abroad and offences committed against German and EU-member state officials abroad.

In Germany, only individuals are subject to criminal prosecution. Jurisdiction does not extend to legal entities such as companies. However, costly fines can be imposed on legal entities.

02 | Bribery of officials

Unlawful influence of officials may constitute an act of bribery. Bribery of an official occurs when a person offers, promises or grants an official a benefit in order to convince the official either to perform an act contrary to his official duty or even to perform an act within her/his duty. Bribery is also committed by the person receiving the bribe.

Officials include civil servants or judges, as defined under German law. Officials also include persons working in the German public sector, for example those who have an administrative function or perform administrative tasks, even if the company is privately operated. The bribery offences also relate to a person entrusted with 'special public services', which is a broadly defined term.

There are some restrictions with regard to the bribery of foreign officials. The unlawful influence of foreign officials is prohibited when it is done for the purpose of obtaining business or an improper advantage in international business transactions. The unlawful influence of a foreign official must relate to a future breach of duty by the foreign official. The grant of a benefit to a foreign official in order to convince her/him to perform an act within her/his duty is not punishable under German law. Further, unlike in the domestic context, only active bribery of foreign officials in international business is prohibited under German law.

03 | Facilitation payments

Making facilitation payments to German officials is punishable. Only in very few cases are these payments considered as acceptable behaviour. The person who receives the facilitation payments is also punishable under German criminal law.

However, making facilitation payments to foreign officials, which are payments for the performance of lawful acts, are not prohibited under German criminal law.

04 | New legislation proposed in the pharmaceutical industry

In 2012, the German Federal Supreme Court decided that a resident doctor does not act as an official or representative of the statutory health insurance scheme. Therefore, criminal liability based on bribery of officials or bribery in commercial transactions does not apply with regard to resident doctors. Bribery of officials may, however, occur during other dealings between pharmaceutical companies and relevant members of the health sector.

In reaction to this decision of the German Federal Supreme Court, the European Federation of Pharmaceutical Industries and Association (EFPIA) plans to institute a Transparency Code in Germany.

05 | Bribery in commercial transactions

Bribery may also occur in commercial transactions. A person who offers or grants employees or agents of another company a financial or other benefit for themselves or a third party as consideration for the latter improperly granting her/him or his company preferential treatment in comparison with other competitors in relation to the supply of goods or commercial services may be punishable for bribery in commercial transactions. The same applies to employees or agents of a company who request, allow to be promised, or accept such advantages.

Bribery in commercial transactions may be committed in Germany as well as by or against German citizens abroad.

06 | Gifts and hospitality

Low-value courtesy gifts, giveaways or invitations of a low value may in some cases be considered as ‘acceptable because socially adequate’. However, there is no statutory threshold in relation to such behaviour. Acceptable behaviour is determined on a case-by-case basis. Many companies operating in Germany have already implemented policies covering, for example, gifts and hospitality, charitable giving, procurement and travel. Companies need to train employees regularly in these areas in order to ensure that employees understand and follow their gifts and hospitality policies.

07 | Penalties and fines for members of the management, supervisory board members and compliance officers

Individuals who are guilty of bribery are liable on conviction to imprisonment for up to 10 years, or to a fine, or both. An occupational ban may also be imposed on wrongdoers. Members of the management of a company or partnership may also be punishable in cases of neglect of corporate duty to avoid criminal acts by the company’s employees or agents, e.g. business partners of the company. Similar duties apply to compliance officers.

Due to the increase in regulatory enforcement and increasing pressure from stakeholders, customers and the general public, there is now a tendency to prosecute members of management and the supervisory board in the context of corruption. There is no longer a strong resistance by members of the supervisory board against the assertion of damages claims against (former) members of their company’s management, most likely because the supervisory board members may otherwise breach their own fiduciary duties to act in the best interests of the company and may, in a worst case scenario, be found guilty of breach of trust.

08 | Increased fines for companies, disgorgement of profits

In Germany, there is no criminal liability of legal entities for corruption. However, legal entities commit an administrative offence if the management has intentionally or negligently not adequately fulfilled supervisory measures which are necessary to prevent bribery by employees or agents of that company. Such supervisory measures include the appointment, proper selection and supervision of responsible personnel. A company may be fined irrespective of whether or not an individual is held criminally liable.

As of June 30, 2013, the fines that can be imposed on companies have increased. Fines may be imposed in an amount of up to €10 million for wilful misconduct and up

to €5 million for negligent conduct. However, if the profit generated by the offence is higher, the fine may be as high as that profit or even exceed it. Thus, fines have, in some cases, exceeded €100 million.

In addition to fines, disgorgement may be ordered of any economic benefit such as proceeds of contracts or sales gained due to bribery. Money laundering and tax crimes/disclosure obligations may also apply. Bribery payments cannot be deducted against taxes as operating expenses. Further, the finding of bribery may result in a ban on participation in public tenders or eligibility for export credit insurance.

09 | Adequate compliance programmes

Adequate and effective compliance programmes do not constitute a defence per se in administrative corruption proceedings against companies. However, they are taken into account by the court. Compliance programmes need to be tailored to the particular company. Such compliance programmes should include policies in relation to, for example, gifts and hospitality. In order to mitigate corruption risk, a compliance programme needs to take third parties into account and conduct a risk-based due diligence review of them. Further, third party due diligence should be conducted with regard to business partners. Likewise, pre-M&A due diligence should be performed at an early stage of any intended merger or acquisition. All of these measures must be consistently and regularly controlled, monitored and documented. The compliance programmes need to be reviewed periodically in order to make sure that the bribery risks are adequately assessed. In addition to the message from the top by management, companies need to train employees regularly in these areas in order to ensure that employees understand and follow these policies.

10 | Third party risk due diligence

Third party risk due diligence can be a valuable anti-corruption measure. Besides Internet research and the use of paid professional databases or credit check organisations, an important component of a risk-based approach to due diligence is the use of a questionnaire designed to evaluate risk and identify bribery and corruption warning signals (‘red flags’). Red flags can often appear in the process of drafting contracts, including (for example) proposals for payment in cash, payment to or via third parties, unusual payment destinations, due dates deviating from the schedule, rounded amounts, changes of bank details, or the use of several accounts, especially in the absence of any reasonable explanation. The contract with the business partner should require it to comply (as applicable) with the company’s and/or its own anti-corruption policies/code of conduct and give the company the right to conduct compliance audits of the business partner (as well as other relevant provisions).

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